

Alaska Workers' Compensation Appeals Commission

2010 ANNUAL REPORT

Submitted to the Office of the Lieutenant Governor
March 1, 2010



Alaska Workers' Compensation Appeals Commission

1016 W. Sixth Ave., Suite 405

Anchorage, AK 99501

Tel: 907-269-6738

awcac.clerk@alaska.gov

Alaska Workers' Compensation Appeals Commission 2010 Annual Report

TABLE OF CONTENTS

	Page
INTRODUCTION	3
COMMISSION MEMBERS	4
APPEALS COMMISSION CASES	
Cases Filed in 2009	6
2009 Docket	6
Case Closure Rate	6
Indigent Participants	7
Attorney Representation	7
APPEALS COMMISSION DECISIONS	
Published Decisions	8
Orders on Motions	8
Case Resolution	9
Supreme Court Action	9
OTHER APPEALS COMMISSION ACTIVITY	
Regulation Changes	10
Commissioner Training	10
Summer Law Interns	10
Commission Externship	11
Anonymous Participant Surveys	12
CHALLENGES FACING THE APPEALS COMMISSION IN 2010	
Access to an Appeal: Limited English Literacy and Writing an Appeal	12
Reaching Outside Anchorage	12
Uniform Format, Unified Website, Coordinated Accessible Docket	13
Stable, Timely and Accurate Record Transfers	13
CONCLUSION	13
APPENDIX A: 2009 Appeals Commission Docket	15
APPENDIX B: Table of 2009 Published Decisions	19
APPENDIX C: Responses to Office of Administrative Hearings Surveys	20
APPENDIX D: Significant Holdings in 2009 Commission Decisions	21

INTRODUCTION

The Alaska Workers' Compensation Appeals Commission is charged with providing fair, prompt and thoughtful adjudication of appeals from the Alaska Workers' Compensation Board. An appeal to the commission is a formal administrative appeal and appeal decisions must be published. The commission is committed to ensuring that "hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered." AS 23.30.001.

Figure 1 in the next column illustrates the place of the commission in the workers' compensation adjudication system.

The commission chair has certain duties prescribed by law. One of the chair's duties is to make available to the public and file with the lieutenant governor a report regarding the commission's activity for the prior calendar year, including data regarding time periods between initial receipt and final decisions on appeals, not later than March 15th of each year. This report is filed to satisfy that duty.

Figure 1

The **Alaska Supreme Court** hears appeals from the Appeals Commission and the Superior Court. If the Supreme Court finds the commission or the board cannot provide due process to a party, the Supreme Court may order a trial court to hear the case. The Supreme Court decides all questions of law, including constitutionality of statutes and the validity and constitutionality of regulations.

Alaska Superior Court decides actions to declare regulations invalid & statutes unconstitutional, enforces Board subpoenas, decides if claimants are competent to exercise their rights, decides insurance actions, hears criminal fraud cases and personal injury actions filed by employees of uninsured employers.

Alaska Workers' Compensation Appeals Commission hears appeals from decisions by the Alaska Workers' Compensation Board. There are 5 appeals commissioners: 2 appeals commissioners are employee representatives, 2 are employer representatives. The chair is a lawyer who represents the public. Appeals must be heard by 1 employee commissioner, 1 employer commissioner, and the chair. Appeals commission decisions bind the commission itself and all board panels to a uniform interpretation of workers' compensation law. The commission must follow the Supreme Court's rulings. Appeals are decided on the board's record and arguments presented by the parties. Board credibility decisions bind commission. Commissioners use independent judgment on law and procedure, but do not reweigh facts. The appeals commission is in the Department of Labor & Workforce Development, but independent of the Division.

Workers' Compensation Division offices in Anchorage, Juneau or Fairbanks are where people go to get information, file a claim or petition at the Board, and attend board hearings.

- The *Adjudications Section* hearing officers, pre-hearing officers and clerks assist the Board to hear, mediate, and decide cases.
- The *Investigations Section* investigates and prosecutes uninsured employers and fraud of all kinds before the Board.
- The Division also handles inquiries about workers' comp., collects data, enforces reporting, reviews certificates of self-insurance, manages the Workers' Comp Benefits Guaranty Fund, Fishermen's Fund, Second Injury Fund and provides admin support to Board, Division sections & Commission.
- The *Director* may intervene in appeals and originate some actions in Superior Court.

The **Workers' Compensation Board** hears claims and petitions by injured workers, employers, and the State's investigators. Board panels approve settlements and conduct hearings of many kinds. **ONLY A BOARD PANEL MAY DETERMINE CREDIBILITY OF WITNESSES.** The board has 9 industry members, 9 labor members; the Commissioner of Labor is Chair. Board members are appointed for a 3-year term. The board hears cases in 3 member panels (1 labor member, 1 industry member, 1 hearing officer), but may hear cases as a quorum of 2 (representative member plus hearing officer). Each board panel is independent, but must follow appeals commission and Supreme Court rulings. The board as a whole body approves regulations adopted by the Department.

COMMISSIONERS

The appeals commission consists of five members: four representative members and the chair. Each representative member must each have at least 18 months of experience as a member of the Alaska Workers' Compensation Board. Two members represent employees and two members represent employers. The chair must be an attorney who has been engaged in the active practice of law at least five years in the State of Alaska, with experience in workers' compensation law in this state.

The Chief Administrative Law Judge in the Office of Administrative Hearings announces and reviews the applications for each vacancy on the commission and forwards a list of qualified nominees to the Governor for appointment. The Alaska State Legislature must confirm appointees.

The appeals commissioners' 5-year terms are staggered, so a seat on the commission falls vacant every year. Because every appeal is heard by a full, balanced panel, and panelist may not hear cases if they have a connection with a party, avoiding vacancies is a concern of the commission.

The members of the appeals commission are, in order of expiration of term:

Jim Robison, employee representative, is the former president of the Alaska AFL-CIO and the Alaska State District Council of Laborers; vice president of the Tri Trades Public Service Council and Operating Engineers; a former Commissioner of the Alaska Department of Labor under Governor Sheffield. He served as a labor member of the workers' compensation board. **His term expires on March 1, 2011.**

Stephen T. Hagedorn, employer representative, was employed by the Alaska Railroad Corporation for 22 years as the corporate Risk Manager until his retirement in 2009. He has a bachelor's degree in history from the University of Northern Iowa. He served as a member for industry on the workers' compensation board for 15 years before appointment to a five-year term on March 1, 2007. **His term expires on March 1, 2012.**

David W. Richards, employee representative, is a retired member of the Carpenters' Union Local 2247 and current member of Laborers' Local 341. He served as a member for labor on the workers' compensation board in Juneau until 1991. He was appointed to a five-year term in March 2008. **His term expires on March 1, 2013.**

Philip Ulmer, employer representative, is a registered professional engineer, currently employed as manager of safety and workers' compensation for GCI. He is a previous national president of the American Society of Safety Engineers and of the National Institute for Engineering Ethics, and a 1994 Engineer of the Year finalist with the Alaska Society of Professional Engineers. He was member for industry on the Alaska Workers' Compensation Board. He was re-appointed to a five-year term. **His term expires on March 1, 2014.**

Kristin Knudsen served as chair throughout 2009; her term expired March 1, 2010. She served 17 years in the Alaska Department of Law as an assistant attorney general specializing in workers' compensation law. She was also a hearing officer for the Alaska Workers' Compensation Board, an appellate brief writer for claimant's attorney Chancy Croft and a contract hearing officer for the Oregon Workers' Compensation Appeals Board. She received her J.D. from Santa Clara University in California and a B.A. in history from the University of California Los Angeles. Ms. Knudsen is presently enrolled in the judicial studies master's degree program at the National Judicial College, University of Nevada, Reno.

Laurence P. Keyes was appointed as chair of the commission by Governor Sean Parnell on February 2, 2010.

Mr. Keyes will take office on March 1, 2010. His appointment is subject to legislative confirmation. Mr. Keyes resides in Anchorage. He has practiced law in Kodiak and Anchorage since 1982 in the private sector. Since 1990 he has specialized in the litigation of bodily injury and property damage claims, including workers' compensation claims. Mr. Keyes has lectured in maritime law at the University of Alaska-Anchorage and served as an arbitrator of personal injury claims. He received his LL.M. in maritime law from the University of London in 1988, his J.D. *magna cum laude* from Gonzaga University in 1981, and a B.A. in philosophy from the University of Wisconsin-Madison in 1970. Prior to practicing law, Mr. Keyes worked as a commercial fisherman, longshoreman, and merchant seaman in Alaska, where he has resided since 1977. **His term expires on March 1, 2015.**

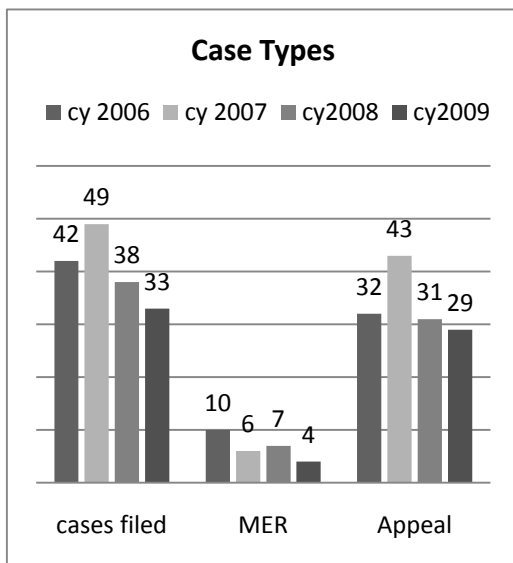
APPEALS COMMISSION CASES

■ Cases Filed in 2009

The commission docketed 33 new cases (appeals and motions for extraordinary review) in calendar year (CY) 2009. In addition to the cases docketed in 2009, the commission began 2009 with 27 cases on its docket, 1 filed in 2006 (remanded by the Supreme Court), 4 filed in CY 2007 and 22 filed in CY 2008. At the end of CY 2009, the commission had 22 cases on the docket, 18 filed in 2009, 3 filed in 2008, and 1, remanded by the Supreme Court, originally filed in 2006. During CY 2009, 3 other cases were remanded from the Supreme Court, and left the commission docket before the end of CY 2009.

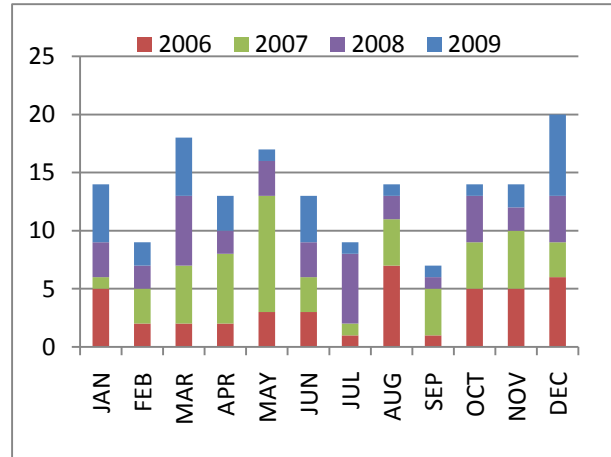
Figure 2 compares total types of cases filed from CY 2006 - 2009.

Figure 2



There is substantial seasonal variation in filing of appeals, as shown in Figure 3.

Figure 3



■ Case Closure Rate

The current average time from filing a case to final decision is 257 days. The commission continues to close most cases within one year. 27 cases were on the docket at the beginning of CY 2009. Only 3 of these 27 remained on the docket at the end of 2009, one for a final award of attorney fees, one due to delay for the Superior Court to act on a guardian *ad litem* appointment for a pro se appellant, and one because the parties requested delays. Of the 33 cases filed in CY 2009, 18 remained open on January 1, 2010. In addition, one 2006 case was returned to the commission for action by the Supreme Court, and an attorney fee motion was filed in the commission.

Taken together, 67% of cases on the 2009 docket were closed in 2009.

■ 2009 Commission Docket

The commission's CY 2009 docket is found at Appendix A.

Figure 4 shows the number of active cases on the commission docket at the end of each month, the new cases filed and production by the commission, from January 2009 through December 2009.

Figure 4

Month	Active Cases on Docket	New Cases Filed	Hearings Held	Decisions	Orders	Default Notices
Jan	29	5	3	2	8	1
Feb	30	2	2	3	10	0
Mar	29	5	3	4	11	1
Apr	33	3	4	1	16	0
May	27	1	4	5	12	1
Jun	28	4	3	1	15	1
Jul	26	1	5	2	14	1
Aug	23	1	2	2	7	1
Sep	21	1	3	2	10	1
Oct	18	1	1	5	8	0
Nov	20	2	3	1	5	0
Dec	22	7	5	3	6	0
Totals		33	38	31	122	7

■ Indigent Participants

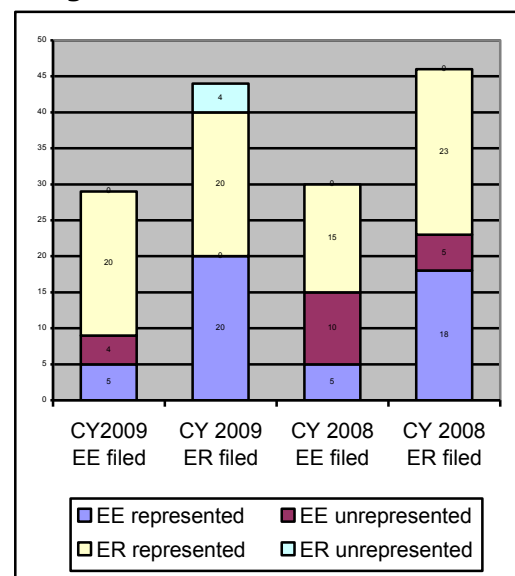
In CY 2009, the commission grant one of four motions to waive fees or provide transcript due to indigence. In 2009, the commission paid \$455.00 for transcripts of board hearings in indigents' appeals before the commission, \$752.50 for transcripts of indigents in appeals to the Supreme Court, and \$817.50 for a transcript of an earlier hearing for the commission's use. The commission paid \$547.00 for translation and interpretation services in CY 2009.

■ Attorney Representation

Self-represented employees filed 4 of the 33 cases filed in CY 2009. Self-represented employers filed 4 appeals from penalty assessment orders. Five (5) cases were filed by employees represented by counsel. The remaining appeals or motions for review were filed by employers or other parties who were represented. In all of the self-represented appeals, the opposing party was represented by legal counsel; of the 26 appeals or motions filed by represented parties, in 4 cases appellees or respondents were self-represented.

Figure 5 compares represented to unrepresented appeal participants. In most employer appeals of compensation awards, the employee is represented. The number of appeals filed by represented employees was unchanged in 2009.

Figure 5



APPEALS COMMISSION DECISIONS

▪ Published Decisions

In 2009, 31 published decisions were issued by the end of the reporting period. Appendix B lists the commission's 2009 published decisions, with days to decision and appeals to the Alaska Supreme Court noted. Decisions issued in 2010 on cases heard in 2009 are also listed in Appendix B.

Appendix D is list of the significant holdings of the commission in 2009, with case name and decision number.

The CY 2009 average time from oral argument (or close of briefing if no hearing was held) to decision distribution for decisions issued in 2009 is 75 days, well within the statutory allowance of 90 days. Notice was given to the parties in cases requiring delay more than 90 days owing to absence of commissioners during deliberation or draft circulation.

▪ Orders on Motions

The commission held 38 hearings in 2009, but not all were hearings of oral argument on an appeal. Not all hearings result in a published decision.

The commission issues orders on non-routine or contested motions, such as motions for stay pending appeal, motions for recusal or objection to the panel, motions to dismiss appeal for lack of jurisdiction, motions to waive

fees for indigence, and motions for attorney fee awards. The commission chair may also issue orders on motions for extension of time, notices of default with orders to comply, and similar procedural matters.

Most motions are decided without a formal hearing. Unless the commission's order on such motions provides guidance by illuminating a point of law, or is otherwise significant to the commission's jurisprudence, these orders are not published.

The commission issued 122 unpublished orders of various types during CY 2009, a 4% decrease from CY 2008. Two of these orders were published at a later date as memorandum orders and one 2008 order was published as a memorandum order.

In addition to sitting with the panel in formal hearings, the commission chair held status hearings and calendaring conferences by telephone. These may result in a calendaring order or notice.

One case filed in CY 2009 called for appointment of a chair *pro tem* due to the chair's conflict (representation by the chair's spouse of the opposing party in another matter involving the similar subject area). The chair *pro tem* was drawn from the Office of Administrative Hearings. In addition, for an absence of the chair in England, a part-time *pro tem* was appointed to

continue making minor orders and conduct hearings as needed.

- **Case Resolution**

20 cases on the CY 2009 docket were closed in 2009 following a decision on the merits. In addition to cases closed by decisions on the merits, 13 cases were closed by order of dismissal due to settlement, one appeal was voluntarily dismissed by the appellant without settlement, one dismissed as moot, and three cases were dismissed after notice of default due to failure to prosecute the appeal. Four remanded cases were closed by order. These numbers do not include cases decided but not yet closed.

The commission examined its action on the decisions issued in CY 2009. In 7 decisions it affirmed the board outright or on different grounds, in 5 decisions it reversed the board or vacated a board decision and remanded, in 4 decisions, it reversed in part and affirmed in part, and in 6 decisions it dismissed the appeal or motion for extraordinary review. The commission also granted 1 motion for extraordinary review filed in CY 2009, but it did not result in case closure in CY 2009. In the remaining published decisions the commission ruled on issues of law raised in motions.

The commission received four motions for extraordinary review in CY 2009, but granted only one motion for extraordinary review filed in CY 2009. The commission does not

consider grant or denial of a motion for extraordinary review to be a decision on the merits of the challenged board order. Filing a motion for extraordinary review does not take jurisdiction from the board unless the motion is granted.

The commission adopted the example of the Alaska Labor Relations Agency of issuing Bench Orders, delivered verbally by the panel in a recorded hearing, or a written Notice of Decision, when there are reasons (such as a pending board hearing) requiring notice of the commission's decision before the written decision is published. This continues to be done rarely.

SUPREME COURT ACTION

Four commission decisions were appealed to the Supreme Court in CY 2009 and two CY 2009 decisions were appealed in CY 2010. Two of the CY 2009 appeals have settled or have a settlement pending without argument being filed.

Appendix B, the list of 2009 commission decisions, contains notes indicating which decisions were appealed. Including two appeals filed in 2008 and appeals filed in 2010, six commission decisions presently await a Supreme Court decision on appeal.

The Supreme Court decided four appeals from the commission in CY 2009. *Bohlmann v. Alaska*

Construction & Engineering, Inc., 205 P3d 316; reversing the commission's decision affirming the board's dismissal of a claim; *Smith v. CSK Auto, Inc.*, 204 P3d 1001, reversing the commission's decision affirming board's denial of Smith's petition to set aside his settlement because board failed to follow its regulations; *Kelly v. State, Dept. of Corrections*, 218 P3d 291, reversing the commission's decision affirming the board's denial of a mental illness claim; *Thurston v. Guys With Tools, Ltd.*, 217 P3d 824, limiting the commission's decision, remanding to the board, affirming the commission in part, and remanding with instruction.

The Supreme Court also issued an opinion on a board decision appealed through the Superior Court prior to the commission's existence, *Irby v. Fairbanks Gold Mining, Inc.*, 203 P3d 1138, reversing the board's denial of a claim for death benefits as untimely.

REGULATION CHANGES

The commission began the process of updating its procedural regulations in August 2009. After public notice and a period for public comment, the commission adopted changes to its regulations in a formal public meeting on January 19, 2010, and the regulations were sent to the Attorney General's Office for Review.

OTHER APPEALS COMMISSION ACTIVITY

■ Commissioner Training

It takes about two years for an appeals commissioner to become comfortable in all aspects of the work assigned to them. The commission's staggered terms means that training is a *constant* need to ensure full participation by representative appeals commissioners. An important part of the chair's duties is to coordinate commission training.

The commission established a regular schedule of periodic training for the appeals commissioners. Formal training was provided again this year by one of the National Judicial College's instructors in judicial writing, retired Alaska Superior Court Judge Karen Hunt, who directed training for the commission in 2008. Ethics training was provided by Judy Bockmon, Assistant Attorney General and a half-day of group training was provided with the Labor Relations Agency and Alaska Workers' Compensation Board that included a presentation by Chief Justice Dana Fabe. The chair also provides informational readings on adjudication and circulates Supreme Court decisions to the commissioners.

■ Summer Law Interns

The appeals commission is keen to provide summer law clerkships to expose interested law students to

workers' compensation and labor law. Summer law interns are given 150 to 180 hours of supervised research and writing experience and instruction by the appeals commission chair and the Alaska Labor Relations Agency (ALRA) administrator.

In CY 2009, the commission was pleased to host summer law interns Jeremy Lehman and Robert Rose, both of the University of Seattle School of Law.

The commission, with the Alaska Labor Relations Agency, will again host two volunteer law student summer interns from the University of Seattle School of Law's "Summer in Alaska" program. Summer in Alaska interns are enrolled in one class taught at UAA by a University of Seattle law professor, receive credit for their service at governmental or non-profit organizations, are housed at UAA and pay their own housing costs.

The commission expects that at least one out of six summer student interns will return to practice in Alaska.

▪ Commission Externship

The appeals commission's interest in providing training and internship opportunities is spurred by the number of injured workers unable to obtain legal help and the increasing age of the claimant bar. Most claimant attorneys are sole practitioners who do not have the time or facilities to

provide training to law students who probably will not return.

The commission has undertaken, with the Alaska Labor Relations Agency and Office of Administrative Hearings to provide a pool of students who have been given greater experience in the workers' compensation and labor relations field, trained in the Alaska adjudications process, and instructed in good legal writing and analysis.

To that end, the commission secured curriculum and supervision approval from Seattle University School of Law for a 15-credit Alaska Labor externship coordinated with the Office of Administrative Hearings (OSHA) and the Alaska Labor Relations Agency, with the aid of Prof. Susan McClellan. The internship, titled the Alaska Labor Externship, requires a full semester of work with the 3 agencies, a publishable paper on a topic in Alaska labor law, and weekly conferences with the supervising law professor.

This externship was funded originally by a college internship, but it was discovered that the accreditation standards bar payment of a salary to law school externs. Therefore, the position was converted to a housing allowance and transportation, the only support the commission may provide to an accredited law extern. A candidate was offered the externship this year, but declined.

- **Anonymous Participant Surveys**

The commission provides the Office of Administrative Hearings data allowing the Office to send anonymous surveys of the participants in the commission process after final decisions are issued. Few responses were received in 2009. The 2009 survey results are summarized in Appendix C.

CHALLENGES FACING THE APPEALS COMMISSION IN 2010

- **Access to an Appeal: Limited English Literacy and Writing an Appeal**

Since it began in November 2005, the commission has designed respect and fairness toward participants and the cases they bring into the adjudication process. Nonetheless, writing an appellate brief remains the single greatest barrier to full participation for many appeal participants. The commission recognizes that a lack of literacy is a formidable barrier to full, effective participation in an appeal.

The commission made efforts to improve access to the appeal process in 2009 by

- translation and interpretation services in commission proceedings
- improving instruction manuals

- beginning a very simple English guide for participants, with drawings and charts
- improved forms and instructions that will go online with the projected redesign of the commission's website
- training for commission staff

- **Reaching Outside Anchorage**

The commission's only office is in Anchorage and the cost of travel in Alaska is high. In 2009, the commission attempted to establish a video linkage with Fairbanks and Juneau offices so that appeal participants could appear by video at hearings in Anchorage.

The commission entered into an agreement to share equipment with another Department of Labor and Workforce Development division. However, the equipment proved to be obsolete for the purpose intended. In the words of the Department's IT specialist, the conferencing equipment was "dead plastic." Acquiring equipment to establish a video link, either through an off-site web-based service, or direct video-cam phone linkage, is a 2010 priority for the commission. The commission would also like to replace the obsolete analog conference phone in the shared library with a digital phone designed to work with the VOIP phone system currently in use.

- **Uniform Format, Unified Website, Coordinated Accessible Docket**

Lack of a single unified-format website to post all workers' compensation administrative decisions, in a free searchable index compliant with anti-discrimination and security requirements continues to be a concern. The Department of Labor and Workforce Development agencies do not share a single publication format and some decisions are not published online at all.

The commission continues to support the Division's effort to obtain an updated, unified, modern case management data system. This will result in better communication with adjudication participants, better movement of case information and improved public understanding of the workers' compensation adjudication process.

- **Stable, Timely and Accurate Record Transfers**

The commission prepares the record on appeal to the Supreme Court, and receives the record of appeals taken from the workers' compensation. The commission has established a stable and mutually acceptable method of record transfer to the court system, correcting the commission's process to ensure a second review so that any missing copies are found before transmittal.

However, in 2009, it became apparent that a number of records sent from the board were incomplete, requiring the commission to remand one case for rehearing to the board and in another, requiring supplementation by the board from electronic records because the actual documents had been misplaced by the board. The commission also extended the time (usually 40 days) given the board to prepare the record in several cases that were unusually voluminous.

The board's method of keeping and preparing its record and preserving the contents of the record has not changed in two decades. When the responsible clerk is absent, record preparation suffers. A significant challenge for 2010 is the development of a more coordinated, stable, and accurate movement of the record from the board to the commission to the appellate courts.

CONCLUSION

In CY 2009, the commission focused on establishing good practices in hearings, deliberations, and decisions and establishing production stability and consistency. It focused on training commissioners and preparing for transition to a new chair on March 1, 2010. The chair composed a desk book for the next chair, organized commission research and training files, and made sure that staff desk manuals are current. The

commission updated its regulations.
The appeals commission is well

prepared to continue under its new
chair, Laurence P. Keyes.

APPENDIX A: 2009 APPEALS COMMISSION DOCKET

Docket number	Date filed	Case type	Case Title	App'nt att'y	App'ee att'y	Result/Status
06-008	3/17/06	Appeal	<i>Bohlmann v. Alaska Constr. & Engineering, Inc.</i>	NO	YES	<i>Supreme Ct. rev'd & remanded to comm'n to remand to bd</i>
06-010	4/24/06	Appeal	<i>Smith v. CSK Auto, Inc.</i>	NO	YES	<i>Supreme Ct aff'd in part, reversed in part, remanded to comm'n to remand to board</i>
06-015	6/2/06	Appeal	<i>Barrington vs. Alaska Communications Group, Inc.</i>	YES	YES	<i>Supreme Ct rev'd 2008. Comm'n awarded attorney fee in 2009.</i>
06-030	10/24/06	Appeal	<i>Kelly vs. State, Dep't of Corrections</i>	YES	YES	<i>Supreme Ct rev'd. Comm'n awarded attorney fee.</i>
06-039	12/18/06	Appeal	<i>Guys With Tools, Inc. v. Thurston</i>	YES	YES	<i>Supreme Ct remanded with instr. To remand to board, motion for attorney fees filed</i>
07-035	09/07/07	Appeal	<i>Talcott v. Municipality of Anchorage</i>	NO	YES	<i>Dismissed for repeated default</i>
07-036	09/13/07	Appeal	<i>Schouten v. Alaska Indus. Hardware</i>	YES	YES	<i>2008 comm'n remanded bd dec, 2009 comm'n order on attorney fee motion, appeal dismissed by settlement 2009</i>
07-043	11/20/07	Appeal	<i>Alaska R&C Communications v. State, Workers' Comp. Div.</i>	YES	YES	<i>Reconsid. Denied, atty fees award.</i>
07-049	12/17/07	Appeal	<i>Giles v. State, Workers' Comp. Div.</i>	NO	YES	<i>Settled</i>
08-001	1/8/08	Appeal	<i>Marsh Creek v. Benston</i>	YES	YES	<i>Bd. Dec. aff'd in part, rev'd in part</i>
08-007	3/10/08	Appeal	<i>Abonce v. Yardarm Knot Fisheries</i>	NO	YES	<i>Bd. Dec. affirmed</i>
08-013	04/03/08	Appeal	<i>Wilson v. Eastside Carpet</i>	NO	YES	<i>Bd dec. rev'd, remanded, reconsideration denied clarification issued.</i>
08-014	5/7/08	Appeal	<i>McCullough v. Job Ready Inc. & N. Am. Specialty Inc. Co.</i>	NO	YES	<i>multiple applt mot. for time extn., app. suspended and finally resumed after court appt'd a guardian, briefing in progress</i>
08-019	6/27/08	Appeal	<i>Fairbanks Mem'l Hosp. v. State, SIF</i>	YES	YES	<i>Reversed & remanded bd dec, atty fee award</i>
08-020	7/17/08	Appeal	<i>McKenzie v. Assets Inc. & Comm. & Indus. Ins. Co.</i>	NO	YES	<i>Affirmed board, dissent, appealed to Supreme Ct, stayed for approval of settlement</i>
08-021	7/16/08	MER	<i>City of Petersburg v. Tolson</i>	YES	NO	<i>MER denied</i>

Docket Number	Case Filed	Case Type	Case Title	App't att'y	App'ee att'y	Result/Status
08-022	7/23/08	Appeal	<i>McGahuey v. Whitestone Logging, Inc.</i>	NO	YES	<i>Board affirmed, reconsid. Denied appealed 2010</i>
08-024	7/29/08	Appeal	<i>Hummel v. Tlingit Haida Reg'l Housing Auth.</i>	NO	YES	<i>default, dismissed for want of prosecution</i>
08-025	7/30/08	Appeal	<i>Wilder Constr. v. Smith</i>	YES	YES	<i>Settled, dismissed voluntarily</i>
08-026	8/11/08	Appeal	<i>Foster & Assoc. v. Nohr</i>	YES	YES	<i>Dismissed as Settled</i>
08-028	9/4/08	Appeal	<i>Champion Builders v. Dennis</i>	YES	YES	<i>Dismissed as Settled</i>
08-029	10/13/08	Appeal	<i>Stepovich v. State, Workers' Comp Div.</i>	YES	YES	<i>Appeal dis'd, MER filed, dis'd as settled</i>
08-030	10/16/08	Appeal	<i>Winkleman v. Wolverine Supply</i>	NO	YES	<i>Aff'd in part, mod. & remanded</i>
08-031	10/23/08	MER	<i>Alcan Elec. & Eng'ring v. Hope</i>	YES	YES	<i>MER granted, on appeal bd dec. rev'd, mod, & remanded</i>
08-032	10/24/08	MER	<i>Voorhees Concrete Cutting v. Monzulla</i>	YES	NO	<i>MER granted, reconsid denied, bd dec rev'd in part, remanded. Appealed to Supreme Court</i>
08-033	11/18/08	MER	<i>Rockstad v. Chugach Eareckson</i>	NO	YES	<i>MER denied, atty fees against app't denied</i>
08-034	11/28/08	Appeal	<i>Lewis Walunga & Soule v. Municipality</i>	YES	YES	<i>Board reversed and remanded</i>
08-035	12/8/08	Appeal	<i>Griffiths v. Andy's Body & Frame</i>	YES	YES	<i>Affirmed, reversed & remanded, appealed to Supreme Ct, appeal dismissed as settled</i>
08-036	12/22/08	Appeal	<i>Olson v. FedEx</i>	NO	YES	<i>chair recused self, OAH pro tem treated appeal as MER,denied MER, motions dismissed as moot</i>
08-037	12/30/08	Appeal	<i>Fred Meyer, Inc. v. Updike</i>	YES	NO	<i>vacated bd dec denying SIME & dismissing claim, remanded to board</i>
08-038	12/31/08	Appeal	<i>Gibson v. Arco Alaska, Inc.</i>	YES	YES	<i>Heard, decision in drafting</i>
09-001	1/20/09	Appeal	<i>Hearon v Westaff USA, Inc.</i>	NO	YES	<i>Late appeal allowed, settled & dismissed</i>
09-002	1/20/09	Appeal	<i>Knik Kountry Liquor Stores v Humphrey-Coleman</i>	YES	YES	<i>Dismissed as settled</i>
09-003	1/29/09	Appeal	<i>Dan Reeder v. Municipality</i>	YES	YES	<i>Bd dec affirmed, appealed to Supreme Ct., filing pending</i>
09-004	1/30/09	Appeal	<i>State, Dept. of Educ. v. Ford</i>	YES	YES	<i>Oral Arg 1/8/2010</i>

Docket Number	Date Filed	Case Type	Case Title	App't Att'y	App'ee Att'y	Result/Status
09-005	1/30/09	Appeal	<i>Rivera v. Wal-Mart Stores, Inc.</i>	YES	YES	<i>Affirmed bd dec., appealed to Supreme Ct in 2010</i>
09-006	2/02/09	Appeal	<i>Wasser & Winters Co. v. Linke</i>	YES	YES	<i>Den. Mot. for stay, dismissed as settled</i>
09-007	2/03/09	Appeal	<i>City of Kenai v. Hensler, Watson, & Rust,</i>	YES	YES, NO,NO	<i>Reversed in part aff'd in part, remanded</i>
09-008	3/02/09	Appeal	<i>Kinleys Restaurant v. Gurnett</i>	YES	YES	<i>Reversed, aff'd & remanded</i>
09-009	3/10/09	Appeal	<i>Mark & Patricia Lawson dba JB Servs. v. State, Workers' Comp. Div.</i>	NO	YES	<i>Denied Mot. to accept late filed appeal, dismissed appeal</i>
09-010	3/11/09	Appeal	<i>Schouten v. Alaska Indus. Hardware</i>	YES	YES	<i>Dismissed as settled</i>
09-011	3/13/09	Appeal	<i>Christensen dba We Bake, Inc. v. State, Workers' Comp. Div.</i>	NO	YES	<i>Dismissed for lack of prosecution, default</i>
09-012	3/31/09	MER	<i>Alaska Gen. Seafoods, v.. Turpin</i>	YES	YES	<i>Susp'd, settlement pending approval</i>
09-013	4/13/09	Appeal	<i>Church v. Arctic Fire & Safety</i>	NO	YES	<i>Affirmed board</i>
09-014	4/15/09	MER	<i>Providence Health Sys. & Sedgwick v. Hessel</i>	YES	NO	<i>MER granted, appeal heard, dec. pending</i>
09-015	4/20/09	Appeal	<i>Municipality of Anchorage v. Mahe</i>	YES	YES	<i>Stay den'd, dec. on translation, heard, dec. pending</i>
09-016	5/13/09	Appeal	<i>Strong v. Chugach Elec. Ass'n, Inc.,</i>	YES	YES	<i>Remanded to bd for clarification</i>
09-017	6/01/09	Appeal	<i>George W. Easley Co. v. Lindekugel</i>	YES	YES	<i>Dismissed as settled</i>
09-018	6/02/09	Appeal	<i>Lowes HIW v Anderson</i>	YES	YES	<i>Heard, decision pending</i>
09-019	6/08/09	Appeal	<i>H & H Contractors, Inc., and Alaska Ins. Guar. Ass'n v. Onigkeit</i>	YES	YES	<i>Oral Arg heard 2010, dec. pending</i>
09-020	6/29/09	Appeal	<i>Northwest Airlines, Inc. v. Fortner</i>	YES	YES	<i>Dismissed as settled</i>
09-021	7/17/09	Appeal	<i>Alaska Recovery & Investigations, Inc., v. State, Workers' Comp. Div.</i>	NO	YES	<i>Voluntarily dismissed follow default notice</i>
09-022	8/14/09	Appeal	<i>State, Dep't of Trans. v. Stowell</i>	YES	YES	<i>Stayed bd dec. in part, dismissed as settled</i>
09-023	9/25/09	Appeal	<i>Estate of Frank Dinello, d/b/a Alaska N. Country Enterprises, v. Alaska Workers' Comp. Benefits Guar. Fund</i>	YES	YES	<i>Settlement approved, default notice issued</i>
09-024	10/15/09	Appeal	<i>Roberts d/b/a K Supply Co. v. State, Workers' Comp. Div.</i>	NO	YES	<i>Mot for reconsid by Div. Director</i>
09-025	11/02/09	Appeal	<i>Landry v. Trinion Quality Care Servs., Inc., Commerce & Indus. Ins. Co.</i>	Yes	Yes	<i>in briefing</i>
09-026	11/02/09	MER	<i>Craig Pfeifer Constr. Co. v. G. Gianni</i>	YES	YES	<i>Dismissed as settled</i>
09-027	12/08/09	Appeal	<i>M-K Rivers and ACE Indem. Ins. Co. v. Harris</i>	YES	YES	<i>Mot. for stay heard</i>

Docket Number	Date Filed	Case Type	Case Title	App't Att'y	App'ee Att'y	Result/Status
09-028	12/11/09	Appeal	<i>Mayflower Contract Servs., Inc. & Travelers Ins. Co. v. Redgrave</i>	Yes	No	<i>Pro tem chair assign, mot to stay pending</i>
09-029	12/18/09	Appeal	<i>Martin v. Nabors Alaska Drilling, Inc</i>	NO	YES	<i>record preparation</i>
09-030	12/28/09	Appeal	<i>Parker v. Safeway Inc. and Safeway Stores Inc</i>	NO	YES	<i>Mot to Waive Fees pending, appeal docs completed</i>
09-031	12/29/09	MER	<i>J.C. Mktg., James Cottrell IV v. You Don't Know Jack, Inc., and Siemens</i>	YES	YES	<i>MER briefed, Hearing set</i>
09-032	12/30/09	Appeal	<i>Uresco Constr. Materials and Wausau Ins. Cos. v. Porteleki</i>	Yes	YES	<i>Record preparation</i>
09-033	12/31/09	Appeal	<i>Wasser & Winters Co., Inc. and Alaska Nat'l Ins v. Linke</i>	YES	YES	<i>Appeal docs complete, hearing set on mot. for stay</i>

APPENDIX B TABLE OF 2009 PUBLISHED DECISIONS

DECISION No.	APPEAL No.	TITLE	DAYS TO DECISION	DECISION/APPEALED
96	08-021	<i>City of Petersburg vs. Tolson</i>	35	MER DENIED
97	08-031	<i>Alcan Electrical vs. Hope, Redi Electric, NovaPro</i>	21	GRANTED 2008 MER, STAYED BOARD ORDER IN PART, THIRD COMM'NER DISSENTED IN PART
98	08-013	<i>Wilson vs. Eastside Carpet Co.</i>	29	DENIED MOTION TO REMOVE APPEAL TO SUPREME COURT
99	08-013	<i>Wilson vs. Eastside Carpet Co.</i>	90	REV'D. BD. DENIAL OF COMP. RATE, REMAND FOR RECALC. OF COMP. RATE
100	08-033	<i>Rockstad vs. Chugach Eareckson</i>	30	MER DENIED
101	08-001	<i>Marsh Creek, LLC, vs. Benston</i>	206	AFFIRMED PART, REVERSED PART
102	07-043	<i>Alaska R & C Communications, LLC vs. State, Workers' Comp. Div.</i>	54	RECONSIDERATION DENIED
103	08-019	<i>Fairbanks Memorial Hospital vs. State, Second Injury Fund</i>	85	BOARD DEC REVERSED AND REMANDED
104	08-036	<i>Olson vs. Federal Express Corp.</i>	2	APPEAL TREATED AS MER AND DENIED, MOTIONS DISMISSED AS MOOT
105	09-006	<i>Wasser & Winters Co., Inc. vs. Linke</i>	21	MOTION FOR STAY DENIED, CASE SETTLED
106	08-013	<i>Wilson vs. Trena Heikes, Intervenor, and Eastside Carpet Co.s</i>	47	RECONSIDERATION DENIED, NOTICE OF DECISION GIVEN APR. 3, 2009
107	09-001	<i>Hearon vs. Westaff USA, Inc.</i>	19	LATE FILED APPEAL ALLOWED, APPEAL ULTIMATELY DISMISSED AS SETTLED
108	08-033	<i>Rockstad vs. Chugach Eareckson</i>	67	ATTORNEY FEES AGAINST APPELLANT DENIED
109	08-020	<i>McKenzie vs. Assets, Inc.</i>	93	AFFIRMED BOAD, DISSENT BY CHAIR, APPEALED TO SUPREME COURT
110	09-009	<i>Patricia and Mark Lawson d/b/a JB Services vs. State, Workers' Comp. Div.</i>	16	DISMISSED LATE FILED APPEAL
111	08-007	<i>Abonce vs. Yardarm Knot Fisheries, LLC.</i>	64	AFFIRMED BOARD DECISION
112	08-031	<i>Alcan Electrical vs. Redi Electric, Inc.</i>	68	BOARD REVERSED IN PART, AFF'D IN PART, REMANDED
113	09-018	<i>Lowe's HIW, Inc. vs. Anderson</i>	30	ORAL ARGUMENT HELD DECISION PENDING
114	08-032	<i>Voorhees Concrete Cutting vs. Monzulla</i>	70	MOT. TO STAY DENIED, MER GRANTED, BD DEC. REVERSED & REMANDED APPEALED TO SUPREME CT
115	08-030	<i>Winkelman vs. Wolverine Supply Inc.</i>	88	BOARD AFFIRMED, BOARD'S ORDER MODIFIED TO CONFORM TO BOARD'S DECISION
116	09-003	<i>Reeder vs. Municipality of Anchorage</i>	67	BOARD AFFIRMED APPEALED TO SUPREME CT
117	08-029	<i>Stepovich vs. State, Workers' Comp. Div.</i>	38	APPEAL DISMISSED, APPELLANT PERMITTED TO CONVERT APPEAL TO MER, CASE SETTLED
118	08-022	<i>McGahuey vs. Whitestone Logging, Inc.</i>	85	BOARD AFFIRMED, APPEALED TO SUPREME CT
119	08-035	<i>Griffiths vs. Andy's Body & Frame, Inc.</i>	91	BOARD AFFIRMED IN PART, REVERSED IN PART
120	08-037	<i>Fred Meyer, Inc., vs. Updike</i>	91	BOARD REVERSED, REMANDED FOR REHEARING
121	09-008	<i>Kinley's Restaurant & Bar vs. Gurnett</i>	112	BOARD REVERSED IN PART, AFFIRMED IN PART
122	09-005	<i>Rivera vs. Wal-Mart Stores, Inc.</i>	124	BOARD AFFIRMED, APPEALED TO SUPREME CT
123	08-034	<i>Lewis-Walunga & Soule v. Municipality of Anchorage</i>	111	BOARD REVERSED, MUST MAKE FINDINGS TO SUPPORT REDUCED AWARD OF ATTORNEY FEES
124	09-022	<i>State, Dep't of Trans. vs. Stowell</i>	29	MOTION FOR STAY GRANTED, STATE NOT REQUIRED TO POST SUPERSEDEAS BOND
125	09-015	<i>Municipality of Anchorage v. Mahe</i>	33	APPELLEE PROVIDED TRANSLATOR AT COMM'N HEARING BUT APPELLANT NOT REQUIRED TO TRANSLATE BRIEF INTO SAMOAN
126	09-013	<i>Church v. Arctic Fire & Safety</i>	51	AFFIRMED BOARD DECISION

Shaded areas indicate cases heard in 2008, but the decisions were issued in 2009

APPENDIX C RESPONSES TO OFFICE OF ADMINISTRATIVE HEARINGS SURVEYS

Question	Number Responding				
	Private Party	Agency Party		Attorney	
What was your role in this case?	3	0		0	
Where do you live?	Rural Alaska	City in Alaska		Outside Alaska	
	0	2		1	
Including this one, in how many hearings have you participated?	One	2-5	6-10	11-20	20 or more
	1	3	2	0	0

Appeals Commission members	Yes	No	N/A
1. Did the commission members start the proceedings on time?	3	0	0
2. Were the commission members familiar with the issues in the case?	2	1	0
3. Did the commission members pay attention during the proceedings?	2	1	0
4. Did the commission members show you respect?	2	1	0
5. Did the commission members remain even-tempered in the proceedings?	2	1	0
6. Did the commission members give you (or your attorney) opportunities to speak?	2	1	0
7. Did the commission members make clear decisions and rulings during the hearing, such as when objections were raised or requests were made?	2	1	0
8. Did the commission members resolve problems that came up during the case fairly and efficiently?	1	2	0
9. Did the commission members issue written decisions and orders in a timely fashion?	1	2	0

Written Documents	Yes	No	N/A
1. Was information provided in notices useful?	1	2	0
2. Were decisions and orders written in clear, understandable language?	1	2	0
3. Did the decision describe the facts clearly and accurately?	1	2	0
4. Did the decision and any orders include clear explanations of the law?	1	2	0
5. Did the decision's analysis include enough detail to explain the result?	1	2	0

Facilities and Staff	Yes	No	N/A
1. Were hearing support staff helpful in answering general (non-legal) questions or redirecting calls to others who could answer them?	2	1	0
2. Was the location of the hearing room accessible?	2	0	1
3. For in-person hearings: was the hearing room (size, set up, temperature) suitable for the type of proceeding?	2	0	1
4. For telephone hearings: was the sound quality of the telephone connection good?		1	2
5. For participants who listened to a recording of the hearing or other proceedings: was the sound quality of the recording adequate?		0	3

Overall Satisfaction	Yes	No
Do you agree with the final result in the case?*	1	2
Whether or not you agree with the final result, were you satisfied with the hearing process overall?	1	2

*Only 3 surveys were returned, with widely varying comments, from "private investigator should be done with his report soon & when he's done you will be notified as to when to show-up for court & who to bring with you even if it's at gun point" to "I was very surprised at how well the commission chairman handled this case! She was/is a real asset for the state."

APPENDIX D SIGNIFICANT HOLDINGS IN 2009 COMMISSION DECISIONS

Church v. Arctic Fire & Safety, Alaska Workers' Comp. App. Comm'n Dec. No. 126 (Dec. 31, 2009). Board did not abuse its discretion in limiting SIME to records review where employee had already had surgery, an extensive record existed and medical history was well documented, and board left open possibility of medical examination if SIME physician required it.

Municipality of Anchorage v. Mabe, Alaska Workers' Comp. App. Comm'n Dec. No. 125 (Oct. 27, 2009) (published Dec. 29, 2009). Appellant is not required to provide a translation of its brief in Samoan to appellee. It is generally the responsibility of the receiving party to obtain a translation of a brief filed in the common language of the tribunal. Absent evidence that the appellee is unable to pay for the translation and that a translation at commission or appellant expense is the only way of overcoming a significant barrier to meaningful participation in the appeal, the commission will not impose the cost of translation of appellant's brief on appellant or the public.

State, Dep't of Trans. v. Stowell, Alaska Workers' Comp. App. Comm'n Dec. No. 124 (Oct. 15, 2009) (published Dec. 29, 2009). On motion for stay of board award pending appeal, State of Alaska is not required to post a supersedeas bond. Since 1949, the State has been exempt by statute from the courts' authority to require a bond as a condition of a stay, and commission, with less authority than a court, cannot require what the legislature forbade the courts to require.

Lewis-Walunga & Soule v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 123 (Dec. 28, 2009). Board's failure to explain why it chose to award attorney fees under AS 23.30.145(b) on benefits controverted but awarded,

instead of AS 23.30.145(a), is plain error requiring reversal.

Lewis-Walunga & Soule v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 123 (Dec. 28, 2009). The board may not ignore the requirement that it make a finding regarding controversion when awarding attorney fees.

Lewis-Walunga & Soule v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 123 (Dec. 28, 2009). Board recitation that the services were complex is inadequate to describe the relative complexity of the services provided.

Lewis-Walunga & Soule v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 123 (Dec. 28, 2009). Board failed to state if the attorney fee awarded excluded services for benefits not awarded. Commission does not disapprove the comparison of value of benefits awarded to benefits sought as a means of establishing a percentage basis for calculating fee, but board did not make such a comparison here, where only statement was that the requested fees were "a little too high" for the associated award.

Lewis-Walunga & Soule v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 123 (Dec. 28, 2009). There is no presumption that the requested fee is reasonable. Attorney seeking fee must demonstrate the requested fee is reasonable.

Lewis-Walunga & Soule v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 123 (Dec. 28, 2009). Litigation of workers' compensation cases should not be treated as wholly exempt from the balancing of expenditure and risk that employee plaintiffs face in other labor and employment law actions. The legislature chose to shield the worker from

improvident pursuit of a claim, but not his attorney.

Rivera v. Wal-Mart Stores, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 122 (Dec. 29, 2009). When lay testimony is material to the crucial issue before the board, the board must indicate in its decision whether it evaluated the testimony and what weight it gave it. On appeal, claimant who asserted board failed to make findings regarding lay testimony must demonstrate that the testimony offered was material to a question the board had to answer in order to decide the claim.

Rivera v. Wal-Mart Stores, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 122 (Dec. 29, 2009). Testimony is material when it has some logical connection with consequential facts, that is, facts that have a legal consequence.

Rivera v. Wal-Mart Stores, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 122 (Dec. 29, 2009). Rule that requires the commission to assume that failure to testify credibly was not a relevant factor in the board's decision does not mean commission must assume the board believed the witness or that the witness's credibility was a relevant factor. Board silence on witness testimony cannot be interpreted as any judgment on credibility.

Rivera v. Wal-Mart Stores, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 122 (Dec. 29, 2009). In case of low back strain, where board made no finding of medical complexity, the board's broad experience of low back injuries sufficient to support its decision to disregard dispute between parties on the propriety of employee's termination from employment, focus on medical opinion evidence regarding causation of the strain.

Rivera v. Wal-Mart Stores, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 122 (Dec. 29, 2009). Board properly

weighed competing medical evidence and did not require employee to produce evidence in a particular probability formula. Board's comment on the employee's physician's testimony was based on possibilities and inconclusive was a fair comment given physician's descriptions of her opinions.

Rivera v. Wal-Mart Stores, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 122 (Dec. 29, 2009). Board's decision to give greater weight to some medical evidence over competing evidence is conclusive. The appellant did not dispute that the competing evidence was sufficient to overcome the presumption; therefore, it conceded it was sufficient as a matter of law to permit the board to deny the claim.

Kinley's Restaurant & Bar v. Gurnett, Alaska Workers' Comp. App. Comm'n Dec. No. 121 (Nov. 24, 2009). The evidence in support of a controversion is determined as of the time the controversion is mailed. The evidence in support of a controversion is not weighed in determining if it is sufficient to support a valid controversion.

Kinley's Restaurant & Bar v. Gurnett, Alaska Workers' Comp. App. Comm'n Dec. No. 121 (Nov. 24, 2009). A physician's retraction of an opinion supporting controversion is not retroactive to the date of the original opinion. Retraction is effective when communicated. Retraction of an opinion does not mean that the controversion lacked evidentiary support when issued; to hold otherwise would mean that the two opinions had been compared and the later opinion given greater weight.

Kinley's Restaurant & Bar v. Gurnett, Alaska Workers' Comp. App. Comm'n Dec. No. 121 (Nov. 24, 2009). Evidence to support a controversion must be evidence that could rebut a presumption in favor of the claimed benefit if no contrary evidence were introduced, but it need not be evidence that

would prevail against contrary evidence when the dispute is heard.

Kinley's Restaurant & Bar v. Gurnett, Alaska Workers' Comp. App. Comm'n Dec. No. 121 (Nov. 24, 2009). Where no employer medical examination had been done, employer was not required to contact all of employee's physicians for opinion before controversion; only physician employer must contact is the attending physician; however, employer may rely on the only physician employee asked to give an opinion on disability, when employee failed to provide proper designation of attending physician.

Kinley's Restaurant & Bar v. Gurnett, Alaska Workers' Comp. App. Comm'n Dec. No. 121 (Nov. 24, 2009). Employee's direction to employer to address question of disability to consulting physician amounted to designation of consultant as attending physician. Consultant's later referral of adjuster and employee to default attending physician (by regulation) may have been attempt to communicate unwillingness to serve as employee's attending physician, but board failed to make a finding this was so.

Kinley's Restaurant & Bar v. Gurnett, Alaska Workers' Comp. App. Comm'n Dec. No. 121 (Nov. 24, 2009). Employer's written assertion that employee is unable to return to work in the same employment due to work related injury is a position amounting an acceptance of liability for disability compensation which insurer must honor until or unless other evidence is obtained that the employee is able to earn wages in the same or other employment, provided (1) the employee's position is still available and the employment relationship is not terminated (because Act does not give an employee a right to return to same employment by causing vacancy or rehire, but bars discrimination on basis of workers' compensation claim); (2) employer refuses in writing to accept the employee's physician's

release to return to work in the employee's position at the time of injury; and (3) employer's refusal is based on the belief that the employee cannot, because of an undisputed work injury, perform the essential functions of the position. This rule does not apply when the employer offers temporary limited duty, alternate positions, or limitations on hours consistent with medical advice or safety rules, even if a reduction in pay results, or if controversion is supported by other legal grounds.

Fred Meyer, Inc., v. Updike, Alaska Workers' Comp. App. Comm'n Dec. No. 120 (Oct. 29, 2009). Ordering the employee to attend, and employer to pay for, a SIME is no substitute for the board's careful review of the record and evidence.

Fred Meyer, Inc., v. Updike, Alaska Workers' Comp. App. Comm'n Dec. No. 120 (Oct. 29, 2009). Commission will consider an issue that has not been raised when the issue involves a question of law that is critical to a proper and just decision or the error is manifest on the face of the record. A manifest error occurs when an obvious mistake that should have been noticed is made, similar to the plain error standard applicable to arguments raised for the first time on appeal: an obvious mistake that creates a high likelihood of injustice.

Fred Meyer, Inc., v. Updike, Alaska Workers' Comp. App. Comm'n Dec. No. 120 (Oct. 29, 2009). Board may not conditionally decide a claim by denying a claim "at this time." A decision that a claim is awarded or denied is a final decision on the claim. The board may not leave a claim in an indeterminate state forever by appending "at this time" or other such language to the order denying the claim.

Fred Meyer, Inc., v. Updike, Alaska Workers' Comp. App. Comm'n Dec. No. 120 (Oct. 29, 2009). Board failure to review the entire record of claim that dated back to 1993 was obvious mistake, where record transmitted

on appeal consisted of only 230 pages, and medical records were filed no earlier than 2006. The record contained no copy of the compromise and release agreement at issue, no medical reports initially filed and stamped by the board, no compensation reports, no report of injury, and was plainly incomplete. The board did not give notice to the parties that the record was incomplete. Failure to review the record before deciding the record was “not entirely clear” was manifest or plain error that requires board’s order be vacated.

Fred Meyer, Inc., v. Updike, Alaska Workers’ Comp. App. Comm’n Dec. No. 120 (Oct. 29, 2009). Board erred in ordering SIME on board record that failed to demonstrate medical dispute, and where board record did not support finding that record was “not entirely clear.” Record on which board made its decision instead was clearly not entire record.

Fred Meyer, Inc., v. Updike, Alaska Workers’ Comp. App. Comm’n Dec. No. 120 (Oct. 29, 2009). SIME may not be ordered under AS 23.30.110(g) when only medical benefits are claimed because AS 23.30.095(k) is the method for requesting SIME in claim for medical benefits. Board’s authority to order SIME is limited to claims for disability compensation payments. Board cannot use AS 23.30.110(g) to circumvent AS 23.30.095(k)’s requirement of a finding of medical dispute.

Fred Meyer, Inc., v. Updike, Alaska Workers’ Comp. App. Comm’n Dec. No. 120 (Oct. 29, 2009). SIME examinations should not be ordered lightly without evidence of need.

Fred Meyer, Inc., v. Updike, Alaska Workers’ Comp. App. Comm’n Dec. No. 120 (Oct. 29, 2009). Board finding that evidence is insufficiently clear to decide the case is logically inconsistent with its finding that sufficient evidence was produced to overcome the presumption. If employer’s evidence overcame the presumption, it is

adequate to support a conclusion in the employer’s favor if not outweighed by other evidence. The board’s failure to weigh the evidence was plain error.

Griffiths v. Andy’s Body & Frame, Alaska Workers’ Comp. App. Comm’n Dec. No. 119 (Oct. 27, 2009). The 2-year limit on supplementary reemployment compensation (stipend) in AS 23.30.041(k) applies after vocational reemployment plan acceptance or approval.

Griffiths v. Andy’s Body & Frame, Alaska Workers’ Comp. App. Comm’n Dec. No. 119 (Oct. 27, 2009). Reasonable pre-plan stipend payments should not exceed the period established by the legislature for completing the pre-plan process. Absent certain circumstances, such as an unreasonable impediment by the employer, a board award of retroactive pre-plan stipend up to the period established by the legislature is presumptively reasonable.

Griffiths v. Andy’s Body & Frame, Alaska Workers’ Comp. App. Comm’n Dec. No. 119 (Oct. 27, 2009). The effect of a reviewing court’s reversal that vacates a judgment is to return the case to the posture it was before the judgment was entered. Therefore, remand to the board vacating order denying petition for modification of board order terminating benefits returned case to point just before denial of modification.

Griffiths v. Andy’s Body & Frame, Alaska Workers’ Comp. App. Comm’n Dec. No. 119 (Oct. 27, 2009). Modification of a prior board order having prospective effect is effective on the date of the new order entered under AS 23.30.130(a), unless the board makes modification retroactive to the date of the request for modification. This rule does not apply to modification orders issued under AS 23.30.130(b) or modification sought as part of a timely request for reconsideration under AS 44.62.

Griffiths v. Andy's Body & Frame, Alaska Workers' Comp. App. Comm'n Dec. No. 119 (Oct. 27, 2009). Pre-plan stipend is secondary to the primary reemployment benefit which is monitored assistance in developing a plan for reemployment with aid from qualified specialists. Right to stipend in pre-plan gap after exhaustion of temporary disability compensation and permanent partial impairment compensation is contingent on employee's active pursuit of the reemployment benefits, that is, the monitored assistance in developing a plan for reemployment with aid from qualified specialists.

Griffiths v. Andy's Body & Frame, Alaska Workers' Comp. App. Comm'n Dec. No. 119 (Oct. 27, 2009). Eligibility for pre-plan stipend was established by board order modifying order on petition to terminate reemployment benefits, but eligibility for benefits, including stipend, ceased when employee failed to contact re-employment benefits administrator within 15 days to seek appointment of a plan specialist.

Griffiths v. Andy's Body & Frame, Alaska Workers' Comp. App. Comm'n Dec. No. 119 (Oct. 27, 2009). Appeal of board's denial of past due stipend does not excuse failure to contact administrator to continue eligibility for prospective, continuing benefits. The acceptance of prospective benefits under a board order is not a waiver of the claim for past benefits.

McGabhuey v. Whitestone Logging, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 118 (Oct. 23, 2009). Presumption of compensability and presumption of sufficient notice are distinct, but involve similar analyses.

McGabhuey v. Whitestone Logging, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 118 (Oct. 23, 2009). No distinction is to be drawn between raising and attaching the presumption.

McGabhuey v. Whitestone Logging, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 118 (Oct. 23, 2009). Credibility determinations are not made in the first two steps of presumption analysis. In cases where only "totally unreliable testimony" supplies the preliminary link, the link would not be established (or would be rebutted by the evidence of unreliability of testimony), but where some corroborating evidence exists, the lack of credibility of the testimony is not sufficient to eliminate attachment of presumption.

McGabhuey v. Whitestone Logging, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 118 (Oct. 23, 2009). Board erred in evaluating credibility determining presumption attached, but error is harmless where board completed alternate analysis as if claimant had given sufficient notice of claim.

McGabhuey v. Whitestone Logging, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 118 (Oct. 23, 2009). Employer's evidence directly contradicts employee's testimony on significant points and, with admission of lack of timely written notice, overcomes a presumption of sufficient notice. Employee was required to prove, by preponderance of the evidence that he gave sufficient notice of injury or that failure to do so was excusable under AS 23.30.100(d).

McGabhuey v. Whitestone Logging, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 118 (Oct. 23, 2009). Board had sufficient evidence to find lack of timely notice prejudiced employer, a logging company, where testimony established it no longer existed, its employees were gone, and employer records were hard to locate.

McGabhuey v. Whitestone Logging, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 118 (Oct. 23, 2009). Testimony that flatly contradicts employee's account of serious and traumatic injuries at logging camp and the immediate effect they had on his ability

to walk and work eliminated a reasonable possibility that he suffered the traumatic injury he claimed.

McGabhney v. Whitestone Logging, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 118 (Oct. 23, 2009). Employer satisfied board's discovery order by producing evidence it had regarding witness; employer was not required to seek out new information regarding witness and board's support staff had no duty to locate missing witness for the employee, where witness was not an employee of the workers' compensation division.

Stepovich v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 117 (Jan. 5, 2009) (published Sept. 30, 2009). The board's orders often concern a single dispute rather than final disposition of a case. The Alaska Workers' Compensation Act contains no "closure" statute requiring an insurer to give notice of claim closure and requiring a claimant to object or seek reopening in a certain period. Therefore, in determining the finality of a board decision, the commission does not look to the last possible order the board could make in a case.

Stepovich v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 117 (Jan. 5, 2009) (published Sept. 30, 2009). Denial of employer's petition on jurisdictional grounds to dismiss state's petition for assessment of a civil penalty was not a final appealable order because it left the parties' rights in the petition for assessment of a civil penalty unresolved.

Stepovich v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 117 (Jan. 5, 2009) (published Sept. 30, 2009). In view of board's action labeling its decision a "final decision and order," providing instructions for filing an appeal, the appellant's reliance on the board's description of the order, and the lack of a regulation requiring a finding of "final

adjudication" equivalent to a "final judgment" when dispositive petitions are granted or dismissed, the commission allows the appellant to convert appeal to motion for extraordinary review.

Reeder v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 116 (Sept. 28, 2009). Board does not have authority to order employer to cease payroll deductions of overpaid leave pursuant to collectively bargained agreement because the leave payments are triggered by or coordinated with compensation payments.

Reeder v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 116 (Sept. 28, 2009). Board's power to approve settlements under AS 23.30.012 and thereby convert settlement to a board order, is limited to settlement of claims, or liability, for compensation under AS 23.30. only; parties' rights to settle claims under AS 23.30.012 is limited to claims that arise under AS 23.30.

Reeder v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 116 (Sept. 28, 2009). Party relying on a release of liability in approved settlement agreement must show that the release was given with an understanding of the nature of the release. Where employee claimed general release of "claims of any nature whatsoever" in workers' compensation settlement agreement included employer's claims for repayment of injury leave under collectively bargained agreement, the employee must demonstrate that the employer understood that the release language included the leave dispute.

Reeder v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 116 (Sept. 28, 2009). Workers' compensation agreements, like other contracts, are interpreted to give effect to reasonable expectations of parties to agreement. Employee's testimony that he did not know about the potential claim for

leave repayment when the release was signed meant he could not have a reasonable expectation that workers' compensation settlement agreement disposed of employer's claim under collectively bargained agreement for potential injury leave reimbursement.

Reeder v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 116 (Sept. 28, 2009). Workers' compensation settlement waiver of claim for recalculation of compensation rate or additional compensation (including penalty) does not deprive board of authority to require adjuster to provide records of the past compensation payments and the date and amounts paid so the employee could determine if injury leave deductions pursuant to collective bargaining agreement were correctly calculated.

Winkelman vs. Wolverine Supply Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 115 (Aug. 28, 2009). Commission will uphold board's findings of fact if the board had sufficient evidence in the record to support the findings, even if commission would have found other evidence more persuasive. Board, not commission, is the trier of fact.

Winkelman vs. Wolverine Supply Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 115 (Aug. 28, 2009). Commission will not act because board failed to rely on the largest or most impressive medical evidence or most knowledgeable physician; but, commission will act if the evidence board chose to rely on was not substantial, i.e., not evidence a reasonable mind could rely on to reach a conclusion.

Winkelman vs. Wolverine Supply Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 115 (Aug. 28, 2009). Discovery of plain errors of law or fact on review may require commission restraint where the parties had no notice of the error. Neither restraint nor remand is necessary if the board's decision is

clear but order contains clerical error (omitted comma); commission will exercise authority to modify board order to correct a clerical error to conform the board's order to the board's decision.

Voorbees Concrete Cutting v. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 114 (Aug. 6, 2009). Board may not consider its own convenience in determining a petition for change of venue. Because the board based its decision on an impermissible consideration, the commission reverses the board's decision.

Voorbees Concrete Cutting v. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 114 (Aug. 6, 2009). The evidence led the board to find that Anchorage would likely be a more convenient location for the parties and witnesses. However, the board erroneously disregarded the inconvenience and expense of retaining venue in Fairbanks because it considered the presentation of live expert testimony a matter of "election" instead of right.

Voorbees Concrete Cutting v. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 114 (Aug. 6, 2009). The board erred in deciding that possible delay, a finding not supported by substantial evidence, outweighed the known monetary costs and travel time required of the parties and witnesses.

Voorbees Concrete Cutting v. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 114 (Aug. 6, 2009). The last remaining issue to be decided in this case is whether claimant's disc replacement surgery is a medical treatment covered by AS 23.30.095 and does not require knowledge of the long procedural disputes between the parties. Therefore, desire to stay with the hearing officer who is familiar with claimant's case is not a consideration bearing on the "convenience of the parties."

Voorbees Concrete Cutting v. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 114 (Aug. 6, 2009). Law of the case doctrine generally prohibits the reconsideration of issues that have been adjudicated in a previous appeal.

Voorbees Concrete Cutting v. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 114 (Aug. 6, 2009). However, commission's decision left open the possibility that the parties could request a venue change if another hearing was needed because commission based its decision on lack of evidence of the number and location of witnesses. The board left the matter open by stating the convenience of the parties "cannot be fully ascertained until the specific witnesses have been clearly identified." Law of the case doctrine did not bar employer from raising issue of venue after witnesses had been identified.

Voorbees Concrete Cutting v. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 114 (Aug. 6, 2009). The Chief Administrative Law Judge, not the commission, has authority to decide alleged Code of Hearing Officer Conduct violations.

Lowe's HIW, Inc. v. Anderson, Alaska Workers' Comp. App. Comm'n Dec. No. 113 (Jul. 23, 2009). Decision on motion for stay. Granted stay of lump sum past medical benefits, which, once paid to providers, cannot be recovered from the appellee because there is no provision for recovery of medical benefits paid to the provider under the Act.

Lowe's HIW, Inc. v. Anderson, Alaska Workers' Comp. App. Comm'n Dec. No. 113 (Jul. 23, 2009). Commission did not stay lump sum attorney fee award of \$53,000 because (1) not requested and (2) no evidence indicating allocation of fee between stayed portion of award and benefits not stayed; commission cannot order a stay in absence of evidence to support it.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Intent of the Act, that parties should be afforded "due process and opportunity to be heard and for their arguments and evidence to be fairly considered," is implemented in part by the statutory requirement that parties receive adequate notice of a hearing and board's regulations requiring the board and parties have notice of issues and conduct of the hearing.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Board's authority to hear and determine questions in respect to a claim is "limited to the questions raised by the parties or by the agency upon notice duly given to the parties. Absent findings of "unusual and extenuating circumstances," board is limited to deciding issues delineated in the prehearing conference, and, when such circumstances require board to address other issues, sufficient notice must be given to the parties that board will address these issues.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). board failed to follow its own regulation in taking up matters not recorded in a pre-hearing summary; given extent of board's departure from announced issue, board's failure to give notice to the parties that it intended to go beyond record immediately before it at hearing, and lasting impact of the board's findings and order on the rights of the parties, the error was not harmless.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Extensive review of facts by board in written decision was done to justify its decision to award interim compensation until it decided the case on its merits by establishing that circumstances were sufficiently "unique" to

depart from statute that terminates entitlement to TTD on reaching medical stability and to extend liability for TTD to date of board's decision on merits. Board failed to give parties opportunity to address if board had authority to make such an award under AS 23.30.155(d) and made unspoken decision on merits of claim.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). The workers' compensation board has investigatory powers, but possession of investigatory powers alone will not justify their exercise by a hearing panel in the course of adjudicating a claim, at the parties' expense, without giving notice to the parties the hearing panel intends to investigate questions not raised by the parties to the adjudicatory proceeding.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Board's authority to examine books and records or compel attendance of witnesses is limited to the "questions in dispute" in a particular proceeding.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Separation of investigatory and adjudicatory function is consistent with the rule that due process requires some separation between those persons prosecuting (or investigating) the claim and those adjudicating it.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). When board adjudicates, it reaches a judicial decision on a dispute between parties, it decides legal rights and obligations of parties to a particular dispute, and it issues orders fixing parties' legal obligations to each other. When making an investigation, board carries out an official inquiry or examination to find information about specific person or claim,

but it does not decide the legal rights of the parties.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Purpose of the ordered examination was to decide the legal rights of parties to a claim, not to gather information for legislative purposes (as developing regulations) or executive action (granting self-insurance certificate). While board may require an examination of employee claiming or entitled to receive compensation, the board's authority to require the examination of employee's body is limited to issues in dispute when board is conducting a hearing, because purpose of examination must be to enable the board to decide the legal rights of the parties – not merely to find information. Board hearing panel's power to order an examination of persons is limited to the questions in dispute before it.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Where board could not yet have ordered an examination under AS 23.30.095(k), and board identified no specific gaps in the medical evidence or lack of understanding of the medical evidence that prevented it from adjudicating the dispute before it, the board exceeded authority to order an examination under AS 23.30.110(g).

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). In order to join claims, the claims must be in existence. Where two distinct injuries are alleged to be the source of the disability or need for medical benefits, and the competing allegations of injury result in two potentially liable employers, the appropriate process is claim joinder

(or consolidation), not joinder of parties in a single claim.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Board lacks authority to order an employer to pay compensation under AS 23.30.155(d) when no claim has been filed against the employer.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Generally, the commission will not consider a claim of procedural error on appeal that has not been called to the attention of the board hearing panel, unless there is plain error that affects a substantial right and is prejudicial to the result.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Board's hearing panels are administrative bodies, which developed differently from courts, and have less formal rules than courts, but this fact does not diminish board hearing panels' position as "collaborative instrumentalities of justice," and therefore, the independence of each board member and the panel as a whole must be respected.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). The parties to an administrative adjudication, as in workers' compensation proceedings, have a fundamental right to be informed of communications with board hearing panel.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). If hearing panel excludes the parties, it may not permit others to observe the panel's deliberations because parties have no way of knowing if audience comment or response affected the board's deliberations.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Presence of three unauthorized persons for the duration

of the deliberations in an unrecorded session closed to the parties, was prejudicial to the substantive rights of the parties and cannot be cured because there is no way to permit the parties to respond to anything the audience may have contributed.

Abonce v. Yardarm Knot Fisheries, LLC, Alaska Workers' Comp. App. Comm'n Dec. No. 111 (Jun. 17, 2009). Commission-provided interpreters and translators serve the commission rather than the parties. Appellant permitted to file brief in Spanish; commission provided translation. Opinion by Appeals Commissioner Hagedorn.

Abonce v. Yardarm Knot Fisheries, LLC, Alaska Workers' Comp. App. Comm'n Dec. No. 111 (Jun. 17, 2009). Board is not required to rely on employee's physician.

Abonce v. Yardarm Knot Fisheries, LLC, Alaska Workers' Comp. App. Comm'n Dec. No. 111 (Jun. 17, 2009). When the key controversy centers on the medical evidence of causes of employee's conditions, timing alone is not enough to satisfy this burden and establish causation of disabling condition.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Commission treats motion to accept a late-filed appeal as concerning dismissal of appeal for failure to prosecute the appeal, because first duty of appellant is to file a notice of appeal within 30 days. The commission will receive evidence and take testimony on a motion to accept a late-filed appeal.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). 30 days to file appeal begins when the board's decision is filed in the board's office under AS 23.30.110, not day the appellant receives actual notice of the board's decision.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Failure to collect decision from post office after decision was mailed to last known address is not failure of delivery.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Corporation must be represented by an attorney in appeal proceedings before the commission, but party that represented corporation before the board may file notice of appeal to initiate appeal proceedings. Lack of corporate attorney will not excuse failure to file appeal.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Filing a notice of appeal to preserve right of appeal is not onerous or complex.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Commission may give parties notice of conflict with commission record and reopen record to take affidavits from parties if record is unclear.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Read together, AS 23.30.125(a) and 127(a) require an appeal to be filed before the 31st day after the board's decision is filed.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). In the absence of prejudice to the opposing party, the commission holds that substantial compliance with AS 23.30.127(a) is sufficient to preserve an appeal.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Substantial compliance is less than

strict compliance, but it does not mean that a deadline may be ignored. Lawsons did not toll time bar by filing timely but incomplete document evidencing intent to appeal.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Commission will excuse late filing of an appeal when good cause is presented for delay. *Bohlmann v. Alaska Constr. & Engineering, Inc.* illustrates one mechanism by which party may demonstrate good cause, i.e., party was misled by commission staff or other official instruction as to due date of appeal.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Literate appellant who fails to read the decision description of appeal procedures cannot claim that he should be excused because he did not read the appeal procedure advice and that he made good faith effort to file appeal on time.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Showing of absence of prejudice to the opposing parties alone is insufficient to excuse late filing of appeal; a showing of good cause to excuse a late filed appeal means party must show (1) good faith effort to comply with deadline, (2) something outside party's control prevented party from filing on time, and (3) brevity of period between filing and cessation of prevention.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). *authored by Appeals Commissioner Ulmer; Appeals Commissioner Richards concurring. Chair dissented in part. Imposition of discovery sanctions is reviewed for abuse of discretion.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May

14, 2009). Substantial evidence in the record supports board's rejection of claim of mental incompetence as excuse for failure to attend deposition.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Board adequately considered whether lesser sanctions would protect opposing parties and deter discovery violations. Board is not required to examine every alternative remedy. Commission need not determine if board *should* have dismissed claim as sanction if commission concludes board *could* have done so because dismissal was within the range of its discretion.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Appellant failed to allege spoliation of evidence by asserting the opposing party "turned" her witness. Spoliation is destruction or alteration of physical evidence or its intentional concealment until it is destroyed by natural causes. A physician's change in his opinion after reviewing more records is not destruction of the original document evincing his original opinion. Opposing party has no duty to guard physician's opinion against change.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). In limited instances, the commission will take opportunity presented by pro se appellant's argument on appeal, not raised below, to correct misunderstanding by an appellant so the misunderstanding is not perpetuated.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Ex parte communications are prohibited because they provide one party opportunity to influence decision-maker outside the presence of the opposing party. But, ex parte communications to tribunal staff who are not decision-makers on

scheduling or similar administrative, non-substantive matters are not prohibited.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Brief expression of annoyance was not demonstration of opinion originating from source outside the evidence or demonstration of inability to render fair judgment.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Commission need not elucidate pro se appellant's constitutional challenge where none can be identified.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Appellant's barrier to obtaining a lawyer in workers' compensation case is not inability to afford lawyer, because workers' compensation statutes provide ample contingency fees for attorneys. Attorneys whose services are in demand may choose to refuse to represent claimants whose cases present a greater risk than possible reward. Workers' compensation is an economic interest warranting the lowest level of scrutiny. There is no recognized constitutional right to a state-supplied lawyer to enforce economic interests.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Appeal Commissioner Richards concurs: Appellant freely chose her lay representative before the board, so cannot now claim lack of an attorney led to premature dismissal of claim.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Appeal Commissioner Richards concurs: An attorney would not have altered outcome [dismissal of claim] where appellant's conduct was not result of poor strategic choice or omission by lay representatives, but appellant's own refusal to comply with board order.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Chair dissents: If appellant is represented by lay representative that board finds interferes with progression of claim, engages in questionable conduct, and impedes resolution in the claimant's interest, then board should ask claimant if claimant understands and consents to, or adopts, the sanctionable conduct by the representative before board imputes conduct to claimant and dismisses claim.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Chair dissents: Statute permitting non-attorney representation does not mean board may not, by regulation or order, require non-attorney representatives to meet basic ethical and performance standards before the board.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Chair dissents: Statute permits board to fashion "appropriate sanctions;" tailored sanctions of increasing severity directed toward correcting effect of sanction conduct are most "appropriate" sanctions.

Rockstad vs. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 108 (May 11, 2009). Attorneys fees sought against appellant. Held: *Sourdough Express, Inc. v. Barron* does not require the commission to find movant filed motion in bad faith or her positions were frivolous.

Rockstad vs. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 108 (May 11, 2009). Commission's emphasis of the word "any" in its two part test of a bad faith controversion in *Sourdough Express* was intended to convey such a complete absence of legal basis for a controversion that, even with every inference drawn in favor of validity, there is no possibility of mistake, misunderstanding, partial evidentiary support, or other conduct

falling in the borderland between bad faith and good faith.

Rockstad vs. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 108 (May 11, 2009). Licensed adjuster who files such an utterly frivolous controversion may be presumed to have done so in bad faith without proof of malign motive because adjuster possesses a state license that (1) requires specialized education, training, and experience and (2) obligates adjuster to meet certain performance standards related to professional responsibility.

Rockstad vs. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 108 (May 11, 2009). *Sourdough Express* test does not equate frivolity with bad faith. Commission did not hold that all conduct in the borderland between clearly good faith and patently bad faith results in frivolous or unfair controversions.

Rockstad vs. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 108 (May 11, 2009). No evidence presented movant initiated commission proceedings in bad faith. Although mistaken, incomplete, and ultimately unpersuasive, the positions movant took in her motion were not frivolous or unreasonable as a matter of law.

Rockstad vs. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 108 (May 11, 2009). Pleadings or briefs by pro se litigants are read generously, but a lowering of standards for pleadings does not mean a lowering of standards for behavior; unrepresented litigants are held to the same standards of conduct as represented litigants are held to in their actions before the commission.

Rockstad vs. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 108 (May 11, 2009). Lack of an attorney does not excuse a citizen's obligation to conduct herself honestly and courteously

before a tribunal. Ethical duties of courtesy, candor, honesty, diligence, fairness and cooperation are owed to tribunals by the parties, represented or not, and to each other. Lack of an attorney does not grant a party license to behave badly.

Emmet Hearon vs. Westaff USA, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 107 (May 6, 2009). Commission considers a motion to accept late-filed appeal to be like motion to dismiss the appeal for failure to prosecute, because the first duty of an appellant is to file an appeal within the time proscribed by statute.

Emmet Hearon vs. Westaff USA, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 107 (May 6, 2009). There is no statutory presumption that an appeal is filed on time, so the appellant must produce sufficient evidence to persuade commission by a preponderance of the evidence that he should be excused from compliance with statute.

Emmet Hearon vs. Westaff USA, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 107 (May 6, 2009). If board fails to mail a copy of its decision on same day it files the decision in its office, the act of "fil[ing] with the office of the board under AS 23.30.110" is incomplete. Pro se appellant's appeal would have been on time if filed Friday; but appellant believed he was late. Late filed appeal filed next working day accepted.

Bradford T. Wilson vs. Trena Heikes, Alaska Workers' Comp. App. Comm'n Dec. No. 106 (May 4, 2009). Director has the right to intervene at any stage of proceedings in appeal under AS 23.30.127(a).

Bradford T. Wilson vs. Trena Heikes, Alaska Workers' Comp. App. Comm'n Dec. No. 106 (May 4, 2009). Employer may presume that for an hourly worker the statutory method in AS 23.30.220(a)(4) will produce a spendable wage that fairly approximates value of the employee's wages. The

employer does not err by relying on employee's reported taxable income in making an initial calculation of compensation under AS 23.30.220(a).

Bradford T. Wilson vs. Trena Heikes, Alaska Workers' Comp. App. Comm'n Dec. No. 106 (May 4, 2009). Burden is on the employee to show that AS 23.30.220(a)(4) spendable wage does not represent the equivalent of employee wages when 220(a)(4) spendable wage is derived from self-employment income. Board need not go beyond 220(a)(4) if the board finds the reported profits represent the equivalent of employee wages or the board finds that with adjustments the self employment profits represent equivalent of employee wages. Board must look at the evidence and decide the facts in each case.

Bradford T. Wilson vs. Trena Heikes, Alaska Workers' Comp. App. Comm'n Dec. No. 106 (May 4, 2009). AS 23.30.220(a)(5) applies only in cases of previously self-employed hourly workers if the board finds the employee's wage equivalent cannot be determined from self-employment records and other evidence, so that a spendable weekly wage must be calculated under 220(a)(5).

Bradford T. Wilson vs. Trena Heikes, Alaska Workers' Comp. App. Comm'n Dec. No. 106 (May 4, 2009). Tax records may be used to prove reported income, but the board is not limited to accepting federal tax records as proof of all wage equivalent income received by an employee. A previously self-employed employee is not barred from claiming income other than income reported as self-paid wages or salary merely because it is taxed as a business profit instead of a self-paid wage.

Wasser & Winters Co., Inc. v. Linke, Alaska Workers' Comp. App. Comm'n Dec. No. 105 (Apr. 28, 2009). Decision on motion to stay board proceedings pending appeal of final board order limiting EME from further

psychiatric testing, but not interview, of claimant.

Wasser & Winters Co., Inc. v. Linke, Alaska Workers' Comp. App. Comm'n Dec. No. 105 (Apr. 28, 2009). Board's decision on merits of mental illness may, if adverse to the appellee, moot the appeal, but if adverse to appellants will not moot the appeal. The risk of reversal of a decision on the merits of the claim due to appeal is borne by the appellee, but risk of rehearing, and attendant costs, is shared by appellants, appellee, and the board.

Wasser & Winters Co., Inc. v. Linke, Alaska Workers' Comp. App. Comm'n Dec. No. 105 (Apr. 28, 2009). Commission's authority to enforce its jurisdiction does not extend to staying board action to avoid waste of the board's and parties' resources.

Wasser & Winters Co., Inc. v. Linke, Alaska Workers' Comp. App. Comm'n Dec. No. 105 (Apr. 28, 2009). Prehearing officer's referral of appellants' petition for continuance to the board pending appeal provides alternative form of relief; absent showing that appellants requested petition be heard before hearing on merits, or officer refused to set it for hearing before hearing on merits, appellants may not assert board unreasonably foreclosed opportunity to allow board to make decision committed to their discretion: whether jurisdictional conflict or potential waste of resources justify hearing continuance under 8 AAC 45.070(a).

Olson vs. Federal Express Corp., Alaska Workers' Comp. App. Comm'n Dec. No. 104 (Mar. 20, 2009). Title of board's decision is not conclusive of its status as a final, appealable decision for purposes of appeal to the commission.

Olson vs. Federal Express Corp., Alaska Workers' Comp. App. Comm'n Dec. No. 104 (Mar. 20, 2009). Neither initial decision nor decision on reconsideration disposed of

the claim, so proper procedure is to bring a motion for extraordinary review under 8 AAC 57.074. Accordingly, commission treats appeal as a motion for extraordinary review.

Olson vs. Federal Express Corp., Alaska Workers' Comp. App. Comm'n Dec. No. 104 (Mar. 20, 2009). Appeal articulates no grounds for extraordinary review and appellant states she has "changed her mind" and will comply with board's order for an SIME; appeal dismissed.

Fairbanks Mem'l Hosp. v. State, Second Injury Fund, Alaska Workers' Comp. App. Comm'n Dec. No. 103 (Mar. 18, 2009). Fund admitted notice of claim was timely unequivocally in answer. If board wishes, on reconsideration, to decide fact taken out of contention by prior unamended admission by the party opponent, it must give the parties notice that it intends to do so.

Fairbanks Mem'l Hosp. v. State, Second Injury Fund, Alaska Workers' Comp. App. Comm'n Dec. No. 103 (Mar. 18, 2009). Party's failure to take extraordinary measures to object to late-filed brief does not excuse opponent's failure to amend answer before filing brief on reconsideration asserting contrary position.

Fairbanks Mem'l Hosp. v. State, Second Injury Fund, Alaska Workers' Comp. App. Comm'n Dec. No. 103 (Mar. 18, 2009). Board assumed, contrary to *Second Injury Fund v. Arctic Bowl*, and the commission's decision in *North Slope Borough v. Wood*, that date the employee is injured is date of notice of injury for Fund purposes.

Fairbanks Mem'l Hosp. v. State, Second Injury Fund, Alaska Workers' Comp. App. Comm'n Dec. No. 103 (Mar. 18, 2009). Board's failure to apply controlling precedent requires reversal instead of remand, where there is no evidence on which the board could have made a finding that employer

knew, more than 100 weeks prior to notice of possible claim against fund, that second injury would result in substantially greater disability than it would have done in absence of qualifying first injury.

Alaska R & C Communications, LLC v. State, Div. of Workers' Comp., Alaska Workers' Comp. App. Comm'n Dec. No. 102 (Mar. 18, 2009). In proceedings before the commission, the adjudicating board panel is not represented. Argument that board panels should have unfettered discretion to set penalty could not be presented for the first time on reconsideration.

Alaska R & C Communications, LLC v. State, Div. of Workers' Comp., Alaska Workers' Comp. App. Comm'n Dec. No. 102 (Mar. 18, 2009). Commission may review factors used by the board to assess penalties because the reasonableness of the factors considered by the board, where no guidance is provided by regulation, statute, or the Court, is a matter of law.

Alaska R & C Communications, LLC v. State, Div. of Workers' Comp., Alaska Workers' Comp. App. Comm'n Dec. No. 102 (Mar. 18, 2009). The process by which an accused employer is brought before the board, the hearing conducted, and evidence submitted are matters of procedure on which the commission shall exercise its independent judgment.

Alaska R & C Communications, LLC v. State, Div. of Workers' Comp., Alaska Workers' Comp. App. Comm'n Dec. No. 102 (Mar. 18, 2009). Board may not assume the existence or nonexistence of a fact if there is no evidence to support a finding of fact. If there is no evidence that an employer can survive a penalty, the board may not assume that the employer will be able to pay it. The proponent of a fact has the burden of producing evidence to support a finding of that fact, thus if Division asserts uninsured employer can pay a certain penalty amount without going out of business, then the

Division bears the burden of producing evidence that is so.

Alaska R & C Communications, LLC v. State, Div. of Workers' Comp., Alaska Workers' Comp. App. Comm'n Dec. No. 102 (Mar. 18, 2009). Due process requires that the neutral adjudicator, the board, assures the unrepresented accused employer a fair hearing, including adequate notice of accusation, notice of what the board may consider in setting a penalty, and opportunity to present evidence to defend against the accusation and mitigate the severity of a penalty.

Alaska R & C Communications, LLC v. State, Div. of Workers' Comp., Alaska Workers' Comp. App. Comm'n Dec. No. 102 (Mar. 18, 2009). Penalty is designed to punish past conduct and, while threat of penalty may deter future conduct, past conduct will not be prevented by imposition of a penalty, and the general deterrent effect of penalties on *other* employers is enhanced by public hearing. Commission rejects state's argument that board is justified in assessing \$100,000 penalty without fair hearing because doing so will curb the consequences that flow from lack of insurance.

Alaska R & C Communications, LLC v. State, Div. of Workers' Comp., Alaska Workers' Comp. App. Comm'n Dec. No. 102 (Mar. 18, 2009). Nothing in AS 23.30.080(f) suggest the legislature, in devising a broader response to the problems presented by uninsured employers, eliminated the right of the accused employer to a fair, meaningful hearing before a neutral adjudicator before a civil penalty is imposed. Failure to provide any notice of the factors to be used in assessing penalties to the accused employer before assessing the penalty denied employer an opportunity for a meaningful hearing.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Board erred by applying remote

site doctrine to a traveling employee, electrician who traveled to village to install equipment at dock, but because the board found the fight in which the employee was injured arose out of the employment, it is not necessary to resort to the traveling employee rule.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Traveling employee is not a remote site employee because he does not live at an employer's work camp on an on-going, regular basis. Traveling employee travels from employer premises to point not on employer premises for the employer's business and returns to the employer's premises where regular employment duties are resumed.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Evidence of "negative interactions" is insufficient to find a workplace fight occurred in the course of employment. Injuries sustained in a fight may be compensation when the workplace fight was motivated by the employment or the workplace placed the employee at increased risk of assault.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). A limited "aggressor defense" is embodied in the presumption against a willful intention to injure oneself at AS 23.30.120(a)(4) and the claim bar in AS 23.30.235 and denies compensation to the person who struck the first blow.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). The presumption in AS 23.30.120(a)(4) exists because AS 23.30.235 bars compensation for injury proximately caused by the employee's willful intent to injure or kill any person. An injury resulting from willful intent to injure is not an "accidental" injury.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). The presumption in AS 23.30.120(a)(4) is a negative presumption, unlike section 120(a)(1); therefore it may be overcome by presenting substantial evidence that the employee (1) had a willful intent to injure or kill, demonstrated by (a) premeditation and malice or (b) impulsive conduct that is so serious and so likely to result in injury that willfulness must be imputed to it; and (2) did an act that reasonably could be expected to cause injury to himself or another.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Board failed to determine if employer's evidence met part 1 (b) of the above analysis or part 2. Board's findings are not incompatible with the employer overcoming the presumption, therefore the commission remands the case to the board for further findings.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Board erred by requiring employer to eliminate the possibility that the injury was not the result of the employee's willful intent to injure another.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Board failed to acknowledge that the date of injury required it to apply the causal standard in AS 23.30.010, as amended in 2005.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). While the definition of legal cause changed with the 2005 amendment, the statutory method of analyzing claims by evaluating the relative contribution of different causes to the disability" does not bar claims based on employment aggravation of prior personal injuries.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). The board's assumption that the employee's ultimate disability necessarily shares the character (work-related or not work-related) of the initial injury erroneously omits the analysis required by AS 23.30.010(a).

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). The board is not required to submit all proposed expert testimony to the *Daubert/Coon* test to the extent the testifying expert relies on his experience as well as expertise derived from formal training. Challenges to experience-based testimony go to the weight the trier of fact should give the testimony. But, where testifying expert relied on engineering training and knowledge of scientific principles to give opinion on cause of blood spatter, and did not establish sufficient experience or expertise in blood spatter, he did not have sufficient qualifications to testify as an expert witness to what the blood spatter patterns in photographs meant.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Where surprise caused by failure to list expert witness was cured by board's ruling it would leave record open for expert's deposition, owing to the length of the hearing, the expert was not brought to the stand until 20 days after notice of his appearance was given, and opposing party failed to demonstrate board's allowance of witness testimony was prejudicial, board's allowance of the expert witness's rebuttal testimony was not reversible error.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Commission will review a board decision to determine if board made a necessary credibility determination.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar.

13, 2009). Board's statement that it found witness's testimony regarding his alcohol intake credible based on a lack of evidence otherwise suggests board improperly applied a "presumption of credibility." However, in light of the extensive credibility findings in board's discussion of the testimony and characterization of witness as the "most credible of those witnesses who testified" the board's statement was an unfortunate but harmless error.

Rockstad v. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 100 (Feb. 20, 2009). Movant failed to establish on motion for extraordinary review a strong possibility of prejudicial error outweighed sound policy favoring appeals from final board decisions. Movant did not demonstrate likelihood of foreclosure from disclosing information she believes relevant to her history of injury to SIME evaluator; waiting for the final decision on merits of her claim will not result in injustice and unnecessary delay.

Rockstad v. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 100 (Feb. 20, 2009). SIME examiner is not a trier of fact.

Rockstad v. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 100 (Feb. 20, 2009). Commission comments that a physician gains experience in assessing value and trustworthiness of medical records, but not other documents. When board includes non-medical documents in SIME binders, board should inform SIME physician that board does not, by including them for review, vouch for their credibility or reliability. Including non-medical records may lead SIME physician to assume board vouches for its credibility, or that examiner should rely on them as a condition of the examination, or examiner should examine credibility of non-medical records or draw SIME physician into board's function. All are sound reasons for the board's policy of

avoiding inclusion of non-medical records in SIME binders.

Rockstad v. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 100 (Feb. 20, 2009). Speculative possibility that movant might be faced with having to depose the SIME examiner is insufficient to establish grounds for review because SIME has not taken place, examiner has not issued report, and movant has not been refused an opportunity to examine, or cross-examine, SIME examiner.

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 099 (Feb. 2, 2009). On the record before it, board should determine the usual wage for similar services performed by paid employees to calculate independent contractor's gross weekly earnings under AS 23.30.220(a)(5).

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 099 (Feb. 2, 2009). Self-employment profits may result in a fair approximation of employee wages, particularly if (1) the business that consists of services performed solely by the owner; (2) business assets are primarily the advanced skills, education or training of the owner and the owner performs licensed professional services to other organizations not engaged in the same business, such as engineering, architecture or the like; (3) the private practice of traditional professions, such as medicine or law, in which employment is entered only by members of the profession with limited experience, or limited to service with non-profit organizations or public service.

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 099 (Feb. 2, 2009). Intent of the Act is to fairly approximate the value of an employee's lost wages, rather than to account for lost income in any capacity, to provide partial replacement for the approximate lost wages of employees, not for the lost business profits of independent contractors, so the

focus in determining gross weekly earnings when self-employment must be included under AS 23.30.220 should be on the value of the claimant's services to a business, not net business profits.

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 098 (Feb. 2, 2009). Commission has no authority to "certify" question to supreme court; principle that administrative agency has no power to decide constitutional question does not grant the commission authority to ask the Supreme Court to decide a constitutional question before it reviews board's decision.

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 098 (Feb. 2, 2009). Purpose of administrative exhaustion "is to allow an administrative agency to perform functions within its special competence – to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies. When claim raises ONLY constitutional issues, exhaustion doctrine may not apply, and the claimant may file declaratory judgment action in Superior Court.

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 098 (Feb. 2, 2009). Commission applies a second tier of independent judgment to correct board errors of law arising from application of the Alaska Workers' Compensation Act.

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 098 (Feb. 2, 2009). Cases raising constitutional issues require fair, careful and thoughtful review to determine if board has substantial evidence to support its findings, made required findings of fact, and correctly applied challenged statute; especially in "as applied" challenges.

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 098 (Feb. 2, 2009). Commission review ensures that when presented to the Supreme Court the

constitutional challenge is both unavoidable and well-grounded in fact; instead of an unnecessary challenge based on hypothetical or unsupported facts.

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 098 (Feb. 2, 2009). Appellant's challenge to the fundamental policy underlying the statute and the board's decision requires the commission to set out what that policy is, and determine if "the board's decision . . . creates bad public policy in contravention of the Act."

Alcan Electrical and Engineering, Inc. v. Hope, Alaska Workers' Comp. App. Comm'n Dec. No. 097 (Jan. 23, 2009). Grant of motion for extraordinary review movants demonstrated strong possibility that the board departed from its regulations and requirements of due process by (1) ordering the movants to pay TTD compensation without notice or opportunity to respond to claim against them, and (2) ordering cross-movants to pay for, and respondent to attend, a SIME without notice to parties.

Alcan Electrical and Engineering, Inc. v. Hope, Alaska Workers' Comp. App. Comm'n Dec. No. 097 (Jan. 23, 2009). Board-ordered SIME cost not reimbursed under 155(d), and as board ordered SIME, and named the examiner, without notice a party is unable to challenge the examiner or need for examination as provided under 8 AAC 45.092. Dissent by Appeals Comm'ner Hagedorn on stay.

City of Petersburg v. Tolson, Alaska Workers' Comp. App. Comm'n Dec. No. 096 (Jan. 23, 2009). In examining motion for extraordinary review, Commission measures demonstration of prejudice to the movant by weighing the issues raised against the sound policy favoring appeals from final orders or decisions, so that consideration of asserted board error does not result in officious intermeddling by the commission.

City of Petersburg v. Tolson, Alaska Workers' Comp. App. Comm'n Dec. No. 096 (Jan. 23, 2009). MER denied where decision by commission would only add to the board's delay in deciding case, without advancing the resolution of the case, and issues could be preserved by appeal.

City of Petersburg v. Tolson, Alaska Workers' Comp. App. Comm'n Dec. No. 096 (Jan. 23, 2009). The question if board may require an employer to produce an SIME examiner who is resident in another state to appear and answer questions in Alaska, when the board itself has no power to subpoena the citizen of a sister state, is a serious question of due process regardless of the cost to the employer of such a proceeding.

City of Petersburg v. Tolson, Alaska Workers' Comp. App. Comm'n Dec. No. 096 (Jan. 23, 2009). Commission in comment recognized undue delay as violation of due process, if the risk of error has increased with delay, e.g. evidence and testimony presented at hearing are forgotten, delay beyond a member's term. Commission noted the parties' have a due process interest in the prompt, fair adjudication of their claims and defenses, and that once the matter has been brought to hearing, the board's primary duty is to engage in fair decision-making on the evidence in the record.

